

A Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02(NCVC)(W)-1494-09 OF 2015
UMI KALTHUM, HASNAH HASHIM AND HARMINDAR SINGH
JJCA
20 MARCH 2017

C *Tort — Negligence — Professional negligence — Respondents appointed*
appellants as solicitors for sale and purchase of property — Vendor terminated sale
and purchase agreement ('SPA') due to failure of respondents to pay balance of
D *purchase price — Respondents sued appellants for professional negligence*
— Whether respondents estopped from claiming for negligence against appellants
when they elected to proceed with SPA — Whether appellants were negligent in
failing to prepare loan documents — Whether appellant guilty of unprofessional
conduct — Whether there was nexus between exercise of care and skill by
E *appellants as solicitors to granting of loan facility*

The respondents appointed the first appellant to prepare a sale and purchase agreement ('SPA') for the purchase of a property located in Kota Damansara, Selangor Darul Ehsan ('the property'). After the first appellant obtained the consent to transfer the property, the respondents were informed of the completion and extended completion dates of the SPA which was on 26 May 2006 and 26 June 2006 respectively. However, the respondents had failed to secure a bank loan to pay the balance purchase price within the stipulated time period to complete the SPA. The vendor refused to grant any further extension of time to the respondents and subsequently terminated the SPA on 30 June 2006 and further forfeited the respondents' deposit of RM190,000. Consequently, the respondents filed an action alleging negligence on the part of the appellants. The High Court found in favour of the respondents and made a finding that the first and second appellants were in breach of their duty of care towards the respondents. Dissatisfied with the decision, the appellants filed the present appeal. The respondents submitted that they were deprived of the opportunity to terminate the SPA by, first, the failure of the appellants to insert the appropriate clauses as suggested by the respondents and, second, the failure later on by the appellants to terminate the SPA as instructed by the respondents' letter dated 4 January 2006. On the other hand, the appellants submitted that the allegation of negligence in relation to the failure of the appellants to prepare the loan documents was not pleaded. The appellants also disputed the finding of the learned judge with regard to the failure by the appellants to advise the respondents as to the progress of the transaction and also for unprofessional conduct.

Held, allowing the appeal and setting aside the order of the High Court with costs of RM50,000 here and below subject to payment of allocatur fees:

- (1) The contemporaneous documents showed that the respondents were no longer interested in the termination of the SPA but instead took positive steps to proceed with the SPA. Having elected to proceed with the SPA, the respondents were estopped from alleging that the appellants were negligent for not complying with their instructions to terminate the SPA. Only after further extension of time was refused by the vendor that allegation of failure to put in necessary terms and the failure to terminate the SPA were mounted against the appellants. The respondents were approbating and reprobating in adopting such an approach which the law does not permit (see paras 20–24).
- (2) The finding of the learned judge in relation to the failure of the appellants to prepare the loan documents was based on an unpleaded case. Such finding had occasioned a miscarriage of justice and must be set aside. In any event, the appellants could not proceed with the loan documentation unless instructed by the respondents' financiers. As it turned out, the bank's instructions to the first appellant to prepare the loan documents came on 30 June 2006 after the expiry of the extended completion date of the SPA. For this reason, this ground could not form a basis for negligence against the appellants (see paras 27–28).
- (3) No evidence was adduced to show the appropriate standard of care, competence and diligence which the appellants should be held up to in conveyancing practice. There was, at least, no material before the court to rule that the second appellant was guilty of unprofessional conduct. The finding of negligence in this context was therefore unfortunate (see paras 29 & 31).
- (4) There was no inquiry as to whether it was the first appellant's breach of duty which led to the losses sustained. The law requires a causal connection between breach of duty and injury suffered before liability is established in an action for negligence. Applying the 'but for' test in the present case, the question was whether the respondents' damage would have accrued but for the appellants' negligence. In the present case, there was no nexus between the exercise of care and skill by the appellants as solicitors to the granting or otherwise of the loan facility. As such, the respondents had failed to establish liability on the part of the appellants (see paras 32–33).

[Bahasa Malaysia summary]

Responden-responden telah melantik perayu-perayu pertama untuk menyediakan perjanjian jual beli ('PJB') untuk membeli hartanah yang terletak di Kota Damansara, Selangor Darul Ehsan ('hartanah tersebut'). Selepas perayu pertama memperoleh persetujuan untuk memindah milik hartanah

- A tersebut, responden-responden diberitahu tentang tarikh-tarikh siap dan lanjutan siap PJB tersebut iaitu pada 26 Mei 2006 dan 26 Jun 2006 masing-masingnya. Walau bagaimanapun, responden-responden telah gagal untuk memperoleh pinjaman bank untuk membayar baki harga belian dalam tempoh masa yang ditetapkan untuk menyiapkan PJB tersebut. Penjual telah
- B enggan memberikan apa-apa lanjutan masa lanjut kepada responden-responden dan akhirnya menamatkan PJB tersebut pada 30 Jun 2006 dan selanjutnya merampas deposit responden-responden berjumlah RM190,000. Berikutan itu, responden-responden telah memfailkan tindakan mendakwa kecuai di pihak perayu-perayu. Mahkamah Tinggi mendapati
- C telah menyebelahi responden-responden dan membuat penemuan bahawa perayu-perayu pertama dan kedua melanggar kewajipan berjaga-jaga mereka terhadap responden-responden. Berasa tidak puas hati dengan keputusan itu, perayu-perayu telah memfailkan rayuan ini. Responden-responden telah berhujah bahawa mereka terkilan dengan peluang untuk menamatkan PJB
- D tersebut sepertimana diarahkan oleh surat responden-responden bertarikh 4 Januari 2006. Sebaliknya, perayu-perayu telah berhujah bahawa dakwaan cuai berkaitan kegagalan perayu-perayu untuk menyediakan dokumen-dokumen pinjaman yang tidak dipli. Perayu-perayu juga mempertikaikan penemuan hakim yang bijaksana berkenaan kegagalan oleh
- E perayu-perayu untuk menasihati responden-responden berhubung kemajuan transaksi dan juga untuk perilaku tidak profesional.

Diputuskan, membenarkan rayuan dan mengetepikan perintah Mahkamah Tinggi dengan kos RM50,000 di sini dan di bawah tertakluk kepada bayaran fi alokatur:

- F
- (1) Dokumen-dokumen sedia ada menunjukkan bahawa responden-responden tidak lagi berminat dalam penamatan PJB tersebut tetapi sebaliknya mengambil langkah-langkah positif untuk meneruskan PJB tersebut. Setelah memilih untuk meneruskan dengan PJB tersebut,
- G responden-responden diestopkan daripada mengatakan bahawa perayu-perayu telah cuai kerana tidak mematuhi arahan-arahan mereka untuk menamatkan PJB tersebut. Hanya selepas lanjutan masa selanjutnya ditolak oleh penjual yang dakwaan kegagalan untuk meletakkan terma-terma yang perlu dan kegagalan untuk menamatkan PJB tersebut dibuat terhadap perayu-perayu. Responden-responden telah meluluskan dan mengharamkan untuk mengguna pakai pendekatan sedemikian yang tidak dibenarkan oleh undang-undang (lihat perenggan 20–24).
- H
- I (2) Penemuan hakim yang bijaksana berkaitan kegagalan perayu-perayu untuk menyediakan dokumen-dokumen pinjaman adalah berdasarkan kes yang tidak dipli. Penemuan sedemikian telah menimbulkan pelaksanaan yang tidak adil dan mesti diketepikan. Dalam apa keadaan, perayu-perayu tidak boleh meneruskan dokumentasi pinjaman itu

- kecuali diarahkan oleh pembiaya responden-responden. Akhirnya, arahan baki kepada perayu pertama untuk menyediakan dokumen-dokumen pinjaman datang pada 30 Jun 2006 selepas luput tarikh siap PJB tersebut yang dilanjutkan itu. Oleh sebab itu, alasan ini tidak membentuk asas untuk kecuaiian terhadap perayu-perayu (lihat perenggan 27–28). A
- (3) Tiada keterangan telah dikemukakan untuk menunjukkan piawai berjaga-jaga, kekompetenan dan ketekunan yang sesuai yang mana patut dipegang oleh perayu-perayu dalam amalan conveyancing. Terdapat, sekurang-kurangnya, tiada bahan di hadapan mahkamah untuk memutuskan bahawa perayu kedua bersalah kerana berkelakuan tidak profesional. Penemuan kecuaiian dalam konteks ini dengan itu adalah malang (lihat perenggan 29 & 31). B
- (4) Tiada siasatan berhubung sama ada ia adalah pelanggaran kewajipan perayu pertama yang membawa kepada kerugian yang dialami. Undang-undang memerlukan kaitan penyebab antara pelanggaran kewajipan dan kecederaan yang dialami sebelum liabiliti dibuktikan dalam tindakan untuk kecuaiian. Dengan mengguna pakai ujian ‘but for’ dalam kes ini, persoalan adalah sama ada kerugian responden-responden boleh terakru jika bukan kerana kecuaiian perayu-perayu. Dalam kes ini, tiada kaitan antara amalan jagaan dan kemahiran oleh perayu-perayu sebagai peguamcara untuk memberikan atau sebaliknya kemudahan pinjaman itu. Oleh demikian, responden-responden telah gagal untuk membuktikan liabiliti di pihak perayu-perayu (lihat perenggan 32–33).] C
- D
- E
- F

Notes

For cases on professional negligence, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 1641–1737.

Cases referred to

- Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd* [2015] 1 MLJ 284, CA (refd) G
- Chua Seng Sam Realty Sdn Bhd v Say Chong Sdn Bhd & Ors and other appeals* [2013] 2 MLJ 29, CA (refd) H
- Elizabeth Chin Yew Kim & Anor v Dato' Ong Gim Huat (sued as public officer of Hospital Lam Wah Ee) and other appeals* [2017] 1 MLJ 328, CA (refd)
- Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 (refd)
- Ngan Siong Hing v RHB Bank Bhd* [2014] 2 MLJ 449, CA (refd)
- Pembinaan SPK Sdn Bhd v Jalinan Waja Sdn Bhd* [2014] 2 MLJ 322, CA (refd) I
- Sri Alam Sdn Bhd v Tetuan Radzuan Ibrahim & Co (sued as a firm)* [2010] 1 MLJ 284, HC (refd)
- Verschures Creameries, Limited v Hull and Netherlands Steamship Company, Limited* [1921] 2 KB 608, CA (refd)

A Legislation referred to

National Land Code Form 14

Appeal from: Civil Suit No 22NCVC-761–06 of 2012 (High Court, Kuala Lumpur)

B

S Murthi (Ahmad Hanafi bin Lop Ahmad with him) (Theselim Mohd Yusoff & Co) for the appellants.
Zahiah bt Nasir (Zahia Nasir & Co) for the respondents.

C Harmindar Singh JCA:

D [1] This is an appeal against the decision of the High Court at Kuala Lumpur delivered on 10 July 2015 after a full trial. The written grounds of judgment of the learned judge is dated 12 April 2016. The High Court had allowed the respondent's claims for professional negligence. The defendants were found jointly and severally liable for negligence and were awarded special damages of RM190,000 and general damages of RM2m together with interest and costs fixed at RM30,000.

E

[2] This appeal was heard on 15 August 2016. After hearing the parties and taking into consideration the written submissions, we allowed the appeal and set aside the order of the High Court. Our reasons for doing so now follow. For convenience the parties will be referred to as they were in the High Court.

F

BACKGROUND FACTS

G [3] The relevant facts giving rise to the civil suit can be stated as follows. The first plaintiff is the husband of Lim Ah Kim, the second plaintiff. On 5 August 2013, after this suit was filed, Lim Ah Kim passed away due to cancer. The first plaintiff duly obtained the grant of probate for his late wife's estate. The pleadings were accordingly amended to substitute the first plaintiff for the second plaintiff in his capacity as representative of the estate.

H [4] The first defendant was a legal firm. It had two partners, the second and third defendants. The firm has since been dissolved on or around February 2015. At the material time, the second and third defendants operated separate branches and were not involved in each other's practice.

I [5] Sometime in 2005, the plaintiffs appointed the first defendant to prepare a sales and purchase agreement ('SPA') for a property known as No 1, Botanic Villa, Jalan 1, Kenyalang 11/6, Kota Damansara, Selangor Darul Ehsan ('the property'), whereby the plaintiffs were the purchasers of the said property for a purchase price of RM2.2m.

[6] The plaintiffs concluded the SPA with the vendor on 10 January 2005. In consideration, the plaintiffs paid a sum of RM190,000 as deposit to the vendor. The first defendant took steps to implement the SPA, inter alia, by obtaining the consent to transfer the property, submitting the memorandum of transfer for adjudication, and advising the plaintiffs of the timelines. After the first defendant obtained the consent to transfer the property, the plaintiffs were informed of the completion and the extended completion dates of the SPA, namely, 26 May 2006 and 26 June 2006 respectively.

A

B

[7] Meanwhile, the plaintiffs had applied for a loan from a bank to finance the purchase of the said property. The said bank, Bumiputra Commerce Bank (now CIMB Bank) ('the bank'), had made several offers to the plaintiffs in respect of their applications. While initially the plaintiffs had obtained a letter of offer for a loan facility in 2004, the plaintiffs sought for a variation of the terms and conditions imposed by the bank after the plaintiffs concluded the SPA on 10 January 2005. Thereafter, there were various amendments to the bank's letters of offer, and finally a mutually approved terms and conditions for the facility was reached between the plaintiffs and the bank sometime on 30 June 2006.

C

D

[8] This meant that the plaintiffs had failed to secure a bank loan to pay the balance purchase price within the stipulated time period to complete the SPA. Unfortunately for the plaintiffs, the vendor did not agree to grant any further extension of time to the plaintiffs after the extended completion date despite repeated requests from the first defendant on behalf of the plaintiffs. The bank, by way of its letter dated 30 June 2006, issued instructions to the first defendant to prepare the loan documentations for the plaintiffs but this was after the expiry of the extended completion date on 26 June 2006.

E

F

[9] Not surprisingly, since no extension was granted to pay the balance purchase price, the vendor terminated the SPA on 30 June 2006. The reason given was the plaintiffs' failure to make full payment of the balance purchase price before the expiry of the extended completion date of 26 June 2006. The vendor then forfeited the plaintiffs' deposit of RM190,000.

G

[10] Thereafter, the plaintiffs made allegations of negligence against the first defendant for causing losses to the plaintiffs from the mismanagement of the SPA resulting in its termination. In order to better appreciate the arguments of the parties, a tabulated chronology of events based on the trial documents, was provided to the court as shown below:

H

I

A	1	Date	Particulars
B	2	25 November 2004	Loan offer letter from Bumiputra Commerce Bank Bhd ('BCB') to the respondents ('first loan offer')
			Loan amount: RM2.2m
C	3	10 January 2005	Property: Lot No 1 Botanic Villa Jalan Kenyalang 11/6, Kota Damansara, 47810 Petaling Jaya, Selangor Darul Ehsan ('property')
			The respondents' date of acceptance: undated
D	4	16 May 2005	Stamped sale and purchase agreement between Kang Tian Lye ('the vendor') and the respondents ('the purchasers') for the purchase of the property ('agreement').
			The respondents' letter to BCB to request a revision of the terms of the BCB's first loan offer, inter alia:
E	5	18 October 2005	(a) removal of Commerce Investment Guarantee 3 ('CIG3') of RM700,000 by the respondents to BCB; and
			(b) revision of interest rate stipulated by BCB for the loan.
F	6	23 November 2005	Partnership agreement between the the second appellant, Sahal and the third appellant, Theselim, inter alia, change of name from 'Messrs Theselim Jarina & Co' to 'Messrs Theselim Mohd Sahal & Co' and scope of liabilities.
			Letter of confirmation from the vendor's solicitors, Messrs Paul Cheah & Assoc that the vendor's name had been registered on the original title of the property.
G	7	13 December 2005	The vendor's application to the Selangor State Authority for consent to transfer of the property to the respondents. Referred to in Pejabat Daerah Petaling's letter dated 25 January 2006.
			The respondents' letter to the first appellant/Sahal, inter alia, to terminate the agreement, and to recover the deposit and all other monies paid to the vendor.
H	8	4 January 2006	Letter of advice from the first appellant/Sahal in reply to the respondents' letter dated 4 January 2006, inter alia, advising the status of the agreement and that there was no event of default warranting a termination. Sahal enquired on status of the respondents' loan.
			Receipt: 12 January 2006, 2.42am and initialised by the first respondent.
I	9	17 January 2006	Lodgment of private caveat by the respondents on the property referred to as an event in the first appellant/Sahal's letter dated 29 May 2006 to the respondents.

10	25 January 2006	Letter from Pejabat Daerah Petaling, inter alia, granting consent to transfer the property from the vendor to the respondents.	A
11	27 January 2006	Letter from the first appellant/Sahal to the respondents, inter alia, informing respondents that vendor had obtained consent to transfer and balance purchase price under the agreement due to be paid within four months from 27 January 2006. Sahal enquired on status of the respondents' loan.	B
12	8 March 2006	Form 14A memorandum of transfer for the property.	C
13	9 March 2006	Application for adjudication of the Form 14A dated 8 March 2006. Referred to as an event in LHDN's <i>notis taksiran</i> dated 20 April 2006.	
14	22 March 2006	Letter from the vendor's solicitors to the first appellant/Sahal, inter alia, confirming the completion and extended completion dates for the agreement, and stating that the vendor shall not grant any further extension of time after the expiry of the extended completion date. Transmitted by fax to the respondents on 24 March 2006.	D
15	24 March 2006	The first appellant/Sahal forwards a copy of the vendor's solicitors' letter dated 22 March 2006 to respondents.	E
16	31 March 2006	Valuation report on the property by PPC International Sdn Bhd for and on behalf of BCB in respect of the loan intended for the respondents.	F
17	20 April 2006	LHDN stamp duty notice for the Form 14A adjudicating the stamp duty ad valorem of RM60,000.	
18	10 May 2006	Letter from the first appellant/Sahal to the respondents enclosing a copy of the LHDN stamp duty notice dated 20 April 2006 to the respondents, and advising payment. Transmitted by fax to the respondents on 10 May 2006.	G
19	15 May 2006	Letter from the vendor's solicitors to the first appellant/Sahal regarding the completion and extended completion dates, and conditions to be fulfilled by respondents for the extended completion date.	H
20	18 May 2006	Letter from the first appellant/Sahal to the vendor's solicitors in reply to vendor's solicitors' letter dated 13 May 2006 regarding the respondents' obligations under the agreement.	I
21	22 May 2006	Letter from the respondents to the first appellant/Sahal in respect of the progress of the property transaction.	
22	26 May 2006	Deadline: completion date of the agreement.	

A	23	29 May 2006	Letter from the first appellant/Sahal to respondents in reply to the respondents' letter dated 22 May 2006, where the first appellant/Sahal advised the respondents on their queries.
	24	31 May 2006	Letter from the first appellant/Sahal to respondents regarding the respondents' intention to appoint another solicitor to take over conduct of the property transaction.
B	25	31 May 2006	Loan offer letter from Bumiputra Commerce Bank Bhd ('BCB') to the respondents ('second loan offer') Loan amount: RM1.65m Property: Lot No 1 Botanic Villa Jalan Kenyalang 11/6, Kota Damansara, 47810 Petaling Jaya, Selangor Darul Ehsan ('property'). The respondents' date of acceptance: 1 June 2006.
	26	1 June 2006	The respondents' acceptance of BCB's second loan offer.
C	27	13 June 2006	Letter from the first appellant/Sahal to the respondents advising, inter alia, on the upcoming deadline of the extended completion date and requesting funds for the payment of the LHDN stamp duty notice.
	28	16 June 2006	Letter from the first appellant/Sahal to the respondents advising, inter alia, on extended completion date, no instructions from BCB or BCB's lawyers regarding loan facility, consequences of the respondents terminating the agreement and payment of the LHDN stamp duty notice. Transmitted by fax to the respondents on 16 June 2006, 12.45pm.
D	29	19 June 2006	Letter from the first appellant/Sahal to the respondents confirming the respondents' instructions: (a) request further extension of three months to settle balance purchase price; (b) willingness to pay late interest on balance purchase price for the extension; (c) stamp duty will be paid upon confirmation of extension from vendor; and (d) joint inspection date determined after receiving extension from vendor.
E			
F			
G			
H			
I			

30	19 June 2006	Letter from the first appellant/Sahal to the vendor's solicitors requesting inter alia: (a) request for extension of time to pay balance purchase price as BCB had just approved the respondents' loan on 31 May 2006; and (b) the respondents' willingness to proceed with the transaction. Transmitted by fax to the respondents on 20 June 2006, 9.44am.	A B
31	21 June 2006	The first appellant/Sahal lodged a private caveat on the property. Copy of land office receipt transmitted by fax to respondents on 23 June 2006, 5.23pm.	C
32	23 June 2006	See event of 21 June 2006.	
33	23 June 2006	Letter from the vendor's solicitors to the first appellant/Sahal in reply to the first appellant/Sahal's letter dated 19 June 2006, inter alia: (a) the vendor refused to grant further extension of time to the respondents to complete the agreement; and (b) the vendor's instructions that the deposit shall be automatically forfeited upon the expiry of the extended completion date.	D E
34	23 June 2006	The first appellant/Sahal faxed the vendor's solicitors' letter dated 23 June 2006 to the respondents.	F
35	26 June 2006	Letter from the first appellant/Sahal to respondents requesting urgent instructions from the respondents.	
36	26 June 2006	Letter from the first appellant/Sahal advising, inter alia: (a) the updated situation regarding the agreement; (b) the options available to the respondents; and (c) request for instructions from the respondents.	G
37	26 June 2006	Letter from the respondents to the first appellant/Sahal instructing, inter alia: (a) request for extension of time to complete the agreement; (b) to inquire with BCB on status of loan; (c) issue of forfeiture of deposit will be decided after vendor grants the extension; and (d) the vendor should return RM70,000 to the respondents if the vendor does not extend the agreement.	H I

A	38	26 June 2006	Letter from the first appellant/Sahal to the respondents confirming the respondents' instructions and advising, inter alia:
	B		(a) in respect of the loan documents, the first appellant had not received instructions from BCB and respondents were to liaise with BCB; and
			(b) entitlement to obtain refund of RM70,000.
C	39	26 June 2006	Letter from the first appellant/Sahal to the vendor's solicitors requesting, inter alia, the respondents' request for extension of time to complete the Agreement according to the terms of the first appellant's letter dated 19 June 2006.
	40	26 June 2006	Deadline: Extended completion date of the agreement.
D	41	30 June 2006	Letter from the vendor's solicitors to the first appellant/Sahal, inter alia, informing:
	E		(a) failure of respondents to pay balance purchase price on 26 June 2006;
			(b) forfeiture of deposit;
			(c) termination of the agreement; and
			(d) demand for the withdrawal of respondents' private caveat lodged on 21 June 2006.
F	42	30 June 2006	Letter from BCB to the first appellant/Sahal instructing the first appellant to prepare the loan documentations for the respondents and enclosing the following documents:
	G		(a) original agreement dated 10 January 2005;
			(b) amended letter of offer dated 13 June 2006;
			(c) amended letter of offer dated 30 June 2006;
			(d) stamped letter of offer dated 31 May 2006; and
			(e) BCB's security documents.
H	43	3 July 2006	Letter from the first appellant/Sahal to the respondents enclosing the vendor's solicitors' letter dated 30 June 2006 (previously faxed on 30 June 2006 to the respondents) and advising, inter alia:
	I		(a) demand refund of RM70,000 upon withdrawal of private caveat; and
			(b) request for urgent instructions from the respondents.
	44	11 July 2006	Letter from the respondents to the first appellant/Sahal alleging, inter alia:
			(a) lack of advice over payment; and
			(b) withdrawal of private caveat only upon receipt of RM70,000 together with 10% interest daily from date of termination of agreement.

45	12 July 2006	Letter from the first appellant/Sahal to the vendor's solicitors, inter alia: (a) request for return of RM70,000 from the vendor to the respondents; and (b) relayed respondents' instructions that the withdrawal of the private caveat is conditional upon payment of RM70,000 to the respondents.	A B
46	13 July 2006	Letter from the vendor's solicitors to the first appellant/Sahal, inter alia: (a) the vendor's remittance of the RM70,000 to the vendor's solicitors as stakeholder; and (b) release of RM70,000 to the respondents conditional upon withdrawal of the private caveat.	C
47	14 July 2006	Letter from the first appellant/Sahal to the respondents, inter alia: (a) refuting the respondents' allegations in the respondents' letter dated 11 July 2006; (b) the vendor's agreement to refund the RM70,000 to the respondents upon withdrawal of private caveat; and (c) request for urgent instructions from the respondents.	D E
48	14 July 2006	Letter from the respondents to the first appellant/Sahal, inter alia: (a) refusal to agree with the vendor's condition for return of RM70,000; and (b) request for confirmation on payment of RM70,000 by the vendor to the first appellant.	F
49	14 July 2006	Letter from the respondents to the first appellant/Sahal, inter alia: (a) request for advice on private caveat and protection of the respondents' interest; and (b) instructions not to withdraw private caveat.	G
50	17 July 2006	Letter from the first appellant/Sahal to the respondents in reply to the respondents' letter dated 14 July 2006, inter alia: (a) refuting the respondents' allegations; (b) affirming that the agreement was terminated for failure to pay balance purchase price before expiry of extended completion date; and (c) request for instruction regarding the refund of the RM70,000 and removal of private caveat.	H I

A	51	18 July 2006	Letter from the respondents to the first appellant/Sahal, inter alia:
			(a) request for written advice on queries posed; and
B			(b) demand for explanation on payment of late interest and failure to refund RM70,000 by the vendor.
C	52	18 July 2006	Letter from the first appellant/Sahal to the respondents in reply to the respondents' letter dated 18 July 2006, inter alia:
			(a) refuting the respondents' allegations;
D			(b) notice that the first appellant discharge as solicitors for the respondents due to the respondents' allegations; and
			(c) request to the respondents to directly liaise with the vendor's solicitors.
E	53	18 July 2006	Letter from the first appellant/Sahal to the vendor's solicitors informing that the first appellant had discharged themselves from acting for the respondents.
	54	19 July 2006	Letter from the first appellant/Sahal to respondents, inter alia:
F			(a) advice on private caveat and request for appointment of another firm of solicitors to take over conduct.
	55	19 July 2006	Letter from the vendor's solicitors to the first appellant/Sahal, inter alia:
G			(a) confirmation that the cheque for RM70,000 was ready to be collected on the condition that the private caveat had been withdrawn.
	56	20 July 2006	Letter from the first appellant/Sahal to respondents, inter alia, to forward the vendor's solicitors letter dated 19 July 2006 to the respondents.
H	57	6 October 2006	Letter from Messrs Murali B Pillai & Assoc for the respondents to the first appellant/Sahal requesting for the particulars of private caveat and confirmation that the sum of RM70,000 is being held by them as stakeholders.
	58	19 July 2010	Letter from the respondents to Bar Council's Disciplinary Board lodging a complaint against the first appellant/Sahal.

THE PLAINTIFFS' CLAIM AND THE DEFENDANTS' DEFENCE

- I [11] The plaintiffs then filed the instant suit alleging negligence on the part of the defendants. It was not disputed that the first defendant's retainer was to 'menyediakan dan mendrafkan perjanjian jual beli bagi pihak plaintiff-plaintif'. The substantive particulars of the defendants' negligence may be summarised as follows:

- (a) failure to ensure that the SPA contained terms to protect the plaintiffs' interests in the transaction by incorporating comments by the plaintiffs and stipulating time frames for completion; A
- (b) failure to comply with the plaintiffs' instructions to terminate the SPA;
- (c) failure to advise the plaintiffs on the relevant procedures for the property transaction; and B
- (d) failure to protect the plaintiffs' interests and obtain instructions from the plaintiffs while dealing with the vendor, and by unethically discharging as solicitors for the plaintiffs when the vendor terminated the SPA and forfeited the plaintiffs' deposit. C

[12] The plaintiffs also claimed that as a result of the defendants' negligence, they had suffered the following loss and damages:

- (a) loss of investment on the property; D
- (b) emotional distress during and after the property transaction and for failing to purchase the property; and
- (c) financial loss due to the forfeiture of the deposit. E

[13] In their defence, the defendants denied the plaintiffs' claim of negligence on the grounds summarised as follows:

- (a) the first and second defendants had reasonably prepared and implemented the SPA throughout the transaction; F
- (b) the termination of the SPA was because of the plaintiffs' failure to make payment of the balance purchase price to the vendor; and
- (c) the third defendant was not involved in the transaction and had never dealt with the plaintiffs. G

FINDINGS OF THE HIGH COURT

[14] The High Court made a finding that the first defendant and the second defendant were in breach of their duty of care towards the plaintiffs. The grounds for such finding can be summarised as follows:

- (a) the second defendant had failed to incorporate the plaintiffs' comments into the final SPA dated 10 January 2005 concluded between the vendor and the plaintiffs; I
- (b) the second defendant had failed to comply with the plaintiffs' instructions vide their letter dated 4 January 2006 to terminate the SPA;

- A (c) the first and second defendants had failed to prepare the loan documentations for the property transaction;
- (d) the second defendant had failed to advise the plaintiffs regarding the progress of the transaction and had conducted the transaction negligently; and
- B (e) the third defendant was also found jointly and severally liable for damages arising from the first and second defendants' negligence as she was a partner in the first defendant firm.

C THE INSTANT APPEAL

[15] Before us, the defendants argued that the plaintiffs' allegations of negligence were triggered only after the occurrence of the following crucial events:

- D (a) refusal by the vendor to grant a further extension of time to the plaintiffs after the expiry of the extended completion date on 26 June 2006;
- (b) the plaintiffs' failure to secure a loan facility from the plaintiffs' bank on terms acceptable to the plaintiffs within the completion and the extended completion date; and
- E (c) termination of the SPA by the vendor and forfeiture of the 10% deposit and other monies paid to the vendor under the SPA.

F [16] It was further contended that there could be no dispute that the termination of the SPA was due to the plaintiffs' failure to pay the balance purchase price under the SPA within the completion and extended completion dates. The plaintiffs' failure to make payment was because the plaintiffs had failed to secure a loan facility to finance the purchase of the property before the expiry of the completion and extended completion dates of the SPA. It was submitted that the contemporaneous documentary evidence showed that the plaintiffs' allegations of negligence and the High Court's findings against the defendants are not sustainable, and as such the High Court judgment should not stand.

H [17] In this regard, it may be convenient to consider the findings of the learned trial judge on the material issues to determine if the criticisms levelled at the learned judge's findings are valid and justified. From a perusal of the grounds of judgment it is clear that the crux of the learned judge's findings was two-fold. The first material finding of negligence pertains to the failure of the first defendant, and the second defendant in particular, in incorporating the plaintiffs' comments into the final SPA dated 10 January 2005. This is how the learned judge crafted the finding (at para 114):

The second defendant ('Sahal') is negligent for not giving PW1 and his wife the

- opportunity to read the agreement before he instructed them to sign the agreement. PW1 and his wife signed the agreement under the assumption that their comments had been incorporated into the agreement. A
- [18] The second material finding is with respect to the failure of the second defendant to terminate the SPA as per the instructions contained in a letter dated 4 January 2006. This is what the learned judge said (at para 128): B
- The second defendant ('Sahal') is also negligent when he did not contact the vendor to inform him of PW1's wish to terminate the agreement and to obtain a refund of the deposit that had been paid. Instead the second defendant ('Sahal') allowed the matter to be prolonged until he received the letter of termination of the agreement from the vendor's solicitors. C
- [19] These two material findings of negligence are related in the sense that they refer to matters that occurred before the plaintiffs were informed that the vendor had obtained the consent to transfer the said property from the Selangor State Authority. The complaint appears to be that the plaintiffs were deprived of the opportunity to terminate the SPA by, first, the failure of the defendants to insert the appropriate clauses as suggested by the plaintiffs and, second, the failure later on by the defendants to terminate the SPA as instructed by letter. D E
- [20] In this respect, the conduct of the plaintiffs after receipt of the notice that the consent to transfer has been obtained is significant. The contemporaneous documents showed that the plaintiffs were no longer interested in the termination of the SPA but instead took positive steps to proceed with the SPA. In this connection, the plaintiffs commissioned and prepared a valuation report for the property in compliance with the bank's loan offer dated 25 November 2004. Instructions to obtain a further extension of time were given to the defendants by the plaintiffs which extension was obtained. The evidence also disclosed that the plaintiffs' financiers had issued amended offer letters with one dated 13 June 2006 and the final one dated 30 June 2006. In short, there was a clear change of stance and there were no complaints whatsoever about the defendants' failure to incorporate the plaintiffs' comments or to terminate the SPA as the focus of the plaintiffs shifted to getting the best loan terms from their financiers. F G H
- [21] It seems to us that having elected to proceed with the SPA, the plaintiffs are estopped from alleging that the defendants were negligent for not complying with their instructions to terminate the SPA. It certainly appeared that only after a further extension of time was refused by the vendor that allegations of failure to put in the necessary terms and the failure to terminate the SPA were mounted against the defendants. I

A [22] In our view the plaintiffs were approbating and reprobating in adopting such an approach. The law does not permit this. In *Verschures Creameries, Limited v Hull and Netherlands Steamship Company, Limited* [1921] 2 KB 608, Scrutton LJ elucidated the principle as follows at p 612:

B The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that that it is valid, and then turn around and say it is void for the purposes of securing some other advantage. That is to approbate and reprobate the transaction.

C [23] Now having decided to affirm the contract and taking steps to conclude the said contract by obtaining the necessary financing, the plaintiffs are deemed to have abandoned their right by making such an election. In this respect, the learned authors of *Chitty on Contracts* (Vol 1, 31st Ed) had this to say (at para 24-003):

D Where the innocent party, being entitled to choose whether to treat the contract as continuing or to accept the repudiation and treat himself as discharged, elects to treat the contract as continuing, he is usually said to have affirmed the contract. He will not be held to have elected to have affirmed the contract unless, first, he has knowledge of the facts giving rise to the breach, and, secondly, he has knowledge of his legal right to choose between the alternatives open to him. Affirmation may be express or implied. It will be implied if, with knowledge of the breach and of his right to choose, he does some unequivocal act from which it may be inferred that he intends to go on with the contract regardless of the breach or from which it may be inferred that he will not exercise his right to treat the contract as repudiated.

E Affirmation must be total: the innocent party cannot approbate and reprobate by affirming part of the contract and disaffirming the rest, for that would be to make a new contract.

F

G [24] The upshot of the circumstances set out in the foregoing means that the plaintiffs cannot now fall back on the alleged negligence of the their solicitors, the first defendant, to claim for subsequent losses that arose due to the plaintiffs' election to continue with the contract.

H [25] The next finding of the learned judge, which was assailed by the defendants, was in relation to the failure of the defendants to prepare the loan documents. At para 131 of the judgment the learned judge observed:

I The second defendant ('Sahal') was also negligent because he knew that the first plaintiff and his wife had obtained a pre-approved loan from the bank for a sum of RM2.2m to purchase the property. Yet he did not prepare the loan documentation for the first plaintiff and his wife to sign until the first offer of the loan had lapsed.

And further at para 145:

It is clear from para 5(3) of the second letter of offer that as on 31 May 2006, which was still within the extended completion period for the agreement, the first plaintiff

and his wife had obtained the bank's approval for the execution of a new loan agreement within three months from the date of the letter by one of the bank's panel of lawyers, who is none other than the second defendant. But again, the second defendant ('Sahal') did not prepare the loan agreement for the execution of the first plaintiff and his wife to enable the bank to disburse the loan monies to the first defendant as the stakeholder of the first plaintiff and his wife or directly to the vendor's financier to redeem the property ...

[26] In this regard, the first criticism levelled by the defendants/appellants of the learned judge's finding is that this allegation of negligence was not pleaded. It is trite law that parties must confine their case to the pleadings. This is more a rule of fair play in that parties have clear notice of the issues that are going to be adjudicated so that there is no prejudice of a party being taken by surprise and therefore being unprepared to deal with newly sprung issues. The other advantage is that the court's time is not wasted as the issues for determination are identified at the outset during case management by a consideration of the pleadings. So it is imperative that parties be bound by their pleadings (see also *Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd* [2015] 1 MLJ 284; *Pembinaan SPK Sdn Bhd v Jalinan Waja Sdn Bhd* [2014] 2 MLJ 322 and *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196).

[27] A perusal of the pleadings indicates that this finding of the learned judge was based on an unpleaded case. In our view, such finding had occasioned a miscarriage of justice and the decision in this regard must be set aside.

[28] In any event, there was merit in the argument that the defendants could not proceed with the loan documentation unless instructed by the plaintiffs' financiers even though the first defendant was in the bank's panel of solicitors. In this context, it is important to appreciate, and which the learned judge overlooked, that in preparing the loan documents, the defendants will be acting for the bank and not the plaintiffs. As it turned out, the bank's instructions to the first defendant to prepare the loan documents came on 30 June 2006 after the expiry of the extended completion date of the SPA. For this reason as well, this ground could not form a basis for negligence against the defendants.

[29] The final finding which was also attacked was with regard to the failure by the defendants to advise the plaintiffs as to the progress of the transaction and also for unprofessional conduct. A glaring omission, which appeared to have been overlooked all round, was that no evidence was adduced to show the appropriate standard of care, competence and diligence which the defendants should be held up to in conveyancing practice. A solicitor, like all professionals, has a duty to exercise reasonable degree of care and skill expected of a competent and reasonably experienced solicitor. In exercising reasonable care

A and skill, one must act with integrity and diligence (see *Sri Alam Sdn Bhd v Tetuan Radzuan Ibrahim & Co (sued as a firm)* [2010] 1 MLJ 284).

B [30] Thus, whether the first defendant, and in particular the second defendant, who was the solicitor handling the transaction, were negligent may be determined by a consideration of the following questions:

- (a) whether the standard of care practised by the second defendant was the same standard of reasonably competent solicitors in conveyancing practice; and
- C (b) whether the second defendant had acted with diligence in exercising the reasonable care and skill expected to assist the completion of the SPA.

D [31] As alluded to earlier, it is unfortunate that no evidence was led as to the conveyancing practice in existence at the time. The learned judge appeared to rely on the evidence of the plaintiffs who were quite obviously not solicitors professing expertise in the field of conveyancing practice. The defendants, on the other hand, had the evidence of the third defendant who was a senior conveyancing practitioner. She testified that the procedure applied by the second defendant was in accordance with the accepted standards in conveyancing practice. Although she was an interested witness, her testimony was the best available evidence before the court. There was, at least, no material before the court to rule that the second defendant was guilty of unprofessional conduct. The finding of negligence in this context was therefore unfortunate.

F [32] In this respect as well, we are compelled to note that there was no inquiry as to whether it was the first defendant's breach of duty which led to the losses sustained. The law requires a causal connection between breach of duty and injury suffered before liability is established in an action for negligence. In other words, was the defendant's act the effective cause of the harm suffered by the plaintiff? In this respect, the courts look to the test of causation known commonly as the 'but for' test (see *Elizabeth Chin Yew Kim & Anor v Dato' Ong Gim Huat (sued as public officer of Hospital Lam Wah Ee) and other appeals* [2017] 1 MLJ 328; *Chua Seng Sam Realty Sdn Bhd v Say Chong Sdn Bhd & Ors and other appeals* [2013] 2 MLJ 29 and *Ngan Siong Hing v RHB Bank Bhd* [2014] 2 MLJ 449).

I [33] The 'but for' test simply means that 'but for' the defendant's negligent act, the harm would not have occurred. Applying the 'but for' test in the present case, the question is whether the plaintiffs' damage would have accrued but for the defendants' negligence. In our view, the proximate cause of the plaintiffs' losses is the failure of the plaintiffs to obtain the financing and to settle the balance purchase price within the agreed period. That had nothing to do with the defendants as solicitors. It was indeed a matter entirely within the

control of the plaintiffs and the bank. In other words, there was no nexus between the exercise of care and skill by the defendants as solicitors to the granting or otherwise of the loan facility. As such, it must follow that the plaintiffs have failed, in this respect, to establish liability on the part of the defendants.

CONCLUSION

[34] In the circumstances, and for the reasons we have given, we were of the view that the decision of the High Court was plainly wrong. We were persuaded that there has been a clear case of misdirection by the learned trial judge on the issue of liability. As a result, appellate intervention was warranted. Accordingly, we allowed the appeal and set aside the order of the High Court with costs here and below fixed at RM50,000 subject to payment of allocatur fees. We also ordered the refund of the deposit to the appellants/defendants.

Appeal allowed; order of High Court set aside with costs of RM50,000 here and below subject to payment of allocatur fees.

Reported by Dzulqarnain Ab Fatar